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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD AGUILAR,

Defendant and Appellant.

B204595

(Los Angeles County
Super. Ct. No. PA057729)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald S. Coen, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brennan and Jason Tran, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Edward Aguilar (appellant) of assault with a firearm against an unidentified victim (Pen. Code, § 245, subd. (a)(2))¹ (count 1), attempted deliberate and premeditated murder against five other victims (§§ 664/187, subd. (a)) (counts 2-6), and shooting at the same five victims from a motor vehicle (§ 12034, subd. (c)) (counts 7-11). The jury found that all the crimes were committed for the benefit of a gang (§ 186.22, subd. (b)(1)) and that all the crimes, with the exception of the assault, involved the use of a firearm by a principal (§ 12022.53, subds. (b)–(e)(1)).

The trial court sentenced appellant to state prison for a total term of 133 years to life. The sentence consisted of the following: In count 1, the midterm of three years and a five-year gang enhancement; in each of counts 2 through 6, life with the possibility of parole and a firearm-use enhancement of 25 years to life. All sentences are to be served consecutively. Pursuant to section 654, the trial court stayed the sentences in counts 7 through 11 and the remaining enhancements.

Appellant appeals on the grounds that: (1) the trial court abused its discretion in sentencing appellant to consecutive life terms, and (2) defense counsel provided deficient representation in failing to object to consecutive sentences. We affirm.

FACTS

At approximately 4:30 p.m. on the afternoon of November 7, 2006, five boys were standing outside the home of S.M. on Orion Street. One of the boys, D.N. heard someone yell ““Hey white boy”” from a white van that was passing slowly by the group. D.N. saw the front passenger pointing a gun at him. As he ran away he heard six gunshots and someone yelling ““Langdon Street.”” D.N. was not hit.

In a photographic lineup, D.N. identified appellant as the driver of the van, and he also identified the shooter. He had seen the same white van several times near his school, and he recognized appellant as being the driver on two of these occasions.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

D.N. was affiliated with the Valley Side Riders gang (VSR) as were two of the other boys at the scene: S.M. and Henry V. D.N. had seen the shooter confront Henry V. at school, and the shooter said he was from Langdon Street. Henry V. was shot in the leg. Henry V. identified appellant as the driver during a photographic lineup. S.M. was hit by a bullet that grazed his stomach. Another boy, Hugo C., was also shot. The two other boys were not hit.

On the same day, at approximately 4:00 p.m., Vilma U. and her children were exiting their car on Columbus Street when Vilma U. heard a gunshot. She noticed a white van parked nearby. She saw some teenage boys run to the van and then drive away. Her daughter copied all but one digit of the van's license plate, and Vilma U. reported the incident to police. She later saw a news story about the Orion Street shooting and recognized the description of the van. She called police and gave them the license plate number.

Detective John Macchiarella investigated the shooting on Orion Street. Two days after the shooting he interviewed appellant at the Mission Hills police station. The interview was recorded, and the recording was played for the jury. Appellant said he was the driver of the van and named the gang members who were in the van at the time of the shootings. He admitted being a Langdon Street gang member for two years. He was cruising in the van with his gang members, and he knew his homie had a gun. They were going to go "catch VSR," and he drove his homie to get bullets for the gun. He saw the homie load the gun. When they could not find VSR members they went to the area of the Columbus gang. Everyone in the van except appellant got out and chased after some apparent Columbus gang members who were standing on the street. His homie Snapper shot at them, but the men running away were too far to be hit.

Appellant and his fellow gang members then went to look for Blythe Street gang members but found none. They went back to the VSR area and saw the five boys outside in their white T-shirts. Appellant saw his homie Bugs put another bullet in the gun, which was a revolver. Appellant did not think Bugs would shoot anyone, and appellant

told him not to. Appellant said that Bugs told appellant “‘All right. Then I won’t. I will just pistol whip them.’” Appellant just kept driving and, after they passed the boys, he saw Bugs shooting. His fellow gang members were all yelling “‘Langdon.’” Appellant was scared. Appellant did not think anyone had been hit. He then took Bugs to a place where Bugs stashed the gun.

Prior to the interview, Detective Macchiarella had executed a search warrant at appellant’s home where police recovered a cell phone. It contained the names, telephone numbers, and monikers of gang members. Police found photographs of Langdon Street gang members throwing gang signs. There was also a written roll call list for current members of the gang. Police found a book and a notebook with Langdon Street gang graffiti on top, and the names, monikers, and telephone numbers of gang members inside.

A gang expert testified regarding the behavior of gang members in general and the history, hand signs, symbols, and rivals of the Langdon Street gang. He testified about the crimes committed by the gang and stated he believed appellant was a Langdon Street gang member and that the crimes were committed for the benefit of the gang. This was because several Langdon Street gang members were in rival territory with a firearm, hunting down rival gang members in retaliation for acts committed against their members. VSR was not a gang, but rather a group of boys who hung out together and vandalized property, and there was animosity between VSR and Langdon Street gang members in November 2006.

Appellant’s mother testified in his behalf. She purchased the van in 2004. Because she does not have a license, she allowed appellant to drive her to work and drive her other children to school. He also took care of all the family errands.

DISCUSSION

I. Imposition of Consecutive Sentences

A. *Proceedings Below*

At the beginning of the sentencing hearing, the trial court stated it had read and considered the report of the probation officer.² Defense counsel introduced appellant's mother, who addressed the court. She asked for mercy for her son because appellant had been a good son, and this was the first time he had been in trouble. She stated that she was a single mother and appellant had always helped her and been her "right arm." She asked the court to be fair because it was "his first time." Defense counsel sought to clarify that the court would stay counts 7 through 11 under section 654, which the court confirmed, and defense counsel announced he was then ready to proceed.

The prosecutor asked the trial court to impose consecutive sentences on counts 1 through 6. She argued that each of those counts had to do with a separate victim of a shooting, and it was proper to impose the term required by law—life, plus 25 to life as to each count. She argued that the sentence in count 1 should be a determinate term of the court's choosing, plus 10 years pursuant to section 12022.5.

After striking certain enhancements and denying probation, the trial court stated, "Now the court's intent is to impose consecutive terms. I'm referring to California Rules of Court, rule 4.425. And I do find specifically that as to counts 1 through 7, the crimes had independent victims, that is, each had a separate victim. As to count 1, compared to counts 2 through 6, the crimes and their objectives were predominantly independent of each other and involved separate acts of violence, and they were also committed at different times and places. Based on that reason, counts 1 through 6 will be consecutive." The trial court went on to impose sentence in counts 1 through 6, stating for each count

² The probation report listed two factors in aggravation: "the crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness"; and, "the defendant has engaged in violent conduct, which indicates a serious danger to society." The report listed one circumstance in mitigation: "the defendant has no prior record."

that the sentence was consecutive for the reasons the trial court had already stated on the record.

B. Appellant's Argument

Appellant contends there was no justification for sentencing him to such a harsh sentence. He argues that the trial court failed to fulfill its responsibility to state the reasons for its sentence choice on the record in accordance with section 1170, subdivision (c). Appellant points out that California Rules of Court, rule 4.425, subdivisions (a) and (b)³ sets out the criteria affecting the decision to impose consecutive rather than concurrent sentences.⁴ Appellant goes on to discuss rule 4.423, which lists circumstances in mitigation, and contends the trial court failed its duty to fully consider these criteria. Appellant sets forth his version of these circumstances.

With respect to criteria relating to the crime, appellant asserts that, although he admitted to driving the van and knowing that his fellow gang member, Bugs, had a gun, he himself did not take part in the shooting, and he was not sure Bugs would actually fire the gun. From the time of his arrest, appellant admitted his role and expressed remorse. Appellant consistently denied he wanted Bugs to shoot the gun, stating he was hoping Bugs would not shoot. Appellant did not bring the gun, did not touch it, and did not fire it. Although there were separate victims, concurrent sentences for appellant's role should have been imposed because the shooting was one incident "committed so closely in time and place as to indicate a single period of aberrant behavior." (Rule 4.425, subd. (a)(3).)

³ All further references to rules are to the California Rules of Court unless stated otherwise.

⁴ Rule 4.425 provides in relevant part: "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) . . . [¶] Facts relating to the crimes, including whether or not : [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior."

As for factors relating to himself, appellant points out that he had no prior criminal history, either as a juvenile or as an adult. Although the crime involved violence, appellant was not the instigator and did not participate in the actual shooting. He cites his mother's request for mercy and her explanation that this was the first trouble appellant had ever been in. Appellant's statement to Detective Macchiarella reveals a young man who was only beginning to get involved in gang activity and who has good prospects for rehabilitation. Appellant summarizes by stating that neither his role in the crime nor his personal characteristics establish a danger to society to the degree that life in prison with no possibility of release is warranted.

C. Relevant Authority

In deciding whether to impose consecutive sentences, "[t]he sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 and 4.423, as well as any other reasonably related criteria as provided in rule 4.408." (Rule 4.426(b).) Any one aggravating factor is sufficient to support the trial court's decision to impose full consecutive sentences. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729; *People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. Huber* (1986) 181 Cal.App.3d 601, 628.) "In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

As our Supreme Court made clear in *People v. Calhoun* (2007) 40 Cal.4th 398, the relevant culpable factor when there are multiple counts involving different victims is the fact that the "gravity of and [the defendant's] culpability for [the] offense is increased by the *number of those he harmed*." (*Calhoun, supra*, at p. 408, italics added.) "A defendant who commits an act of violence . . . by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." (*Ibid.*; see also *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1061 [consecutive sentences properly

imposed when members of defendant's group shot at another group with whom they were fighting, wounding four and killing one].)

D. No Abuse of Discretion

It is true, as the People point out, that appellant failed to argue against the imposition of consecutive sentences at the sentencing hearing. Although appellant thus forfeited his challenge to the sentence, we address the merits of his argument in light of his claim of ineffective assistance of counsel. (See *People v. Gonzalez* (2003) 31 Cal.4th 745, 755–756 [failure to object to discretionary sentencing choice forfeits issue on appeal]; *People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies to discretionary sentencing choices].)

We conclude that, although the trial court did not engage in a discussion of all of the factors in rules 4.425, 4.421, and 4.423, the trial court's sentencing choice did not constitute an abuse of discretion. Contrary to appellant's assertion, the trial court did state its reason for imposing consecutive sentences, although the trial court was not required to state its reasons on the record for electing to impose consecutive sentences on the indeterminate terms. (*People v. Black* (2005) 35 Cal.4th 1238, 1262, fn. 17 [“No reason need be stated on the record for directing that indeterminate terms run consecutively to one another”], disapproved on other grounds in *Cunningham v. California* (2007) 549 U.S. 270.) In making its finding that the crimes involved separate victims, the trial court clearly relied on the criterion in rule 4.425(a)(2), that names “separate acts of violence” as a factor. We also note that the trial court read and considered the probation officer's report, which listed two aggravating factors and one mitigating factor from rules 4.421 and 4.423.

Appellant's only mitigating factor appears to be that he lacked a criminal record, although appellant names several more. Unless the record shows otherwise, a trial court is deemed to have considered all relevant circumstances that affect sentencing choices. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317–1318.) A trial court need not set forth any reasons for disregarding or minimizing a proffered circumstance in mitigation.

(*Id.* at p. 1317; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Moreover, the trial court specifically took appellant's lack of criminal history into account when imposing sentence in count 1.

Appellant's argument that the nature of the crimes reflect "a single period of aberrant behavior" within the meaning of rule 4.425(a)(3), thereby justifying concurrent sentencing, must also fail. Shooting six times into a group of people unquestionably involves separate acts of violence. (See, e.g., *People v. Thurs* (1986) 176 Cal.App.3d 448, 451-453 [consecutive sentences proper for robbery of husband and wife in home invasion, since these were separate acts of violence]; *People v. Levitt* (1984) 156 Cal.App.3d 500, 518 [criterion of "separate acts of violence" applies to justify consecutive sentences when defendant shoots and kills two people in same office because "each homicide [was] attributable to a separate identifiable act" and there were "separate acts of firing"]; see also *People v. Calhoun, supra*, 40 Cal.4th at p. 408; *People v. Caesar, supra*, 167 Cal.App.4th at p. 1061.)

Accordingly, appellant has not shown the imposition of consecutive sentences was a capricious or arbitrary sentencing choice. Moreover, "[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

II. Defense Counsel's Performance

A. Appellant's Argument

Appellant contends that his counsel failed to provide him with effective assistance at sentencing. He stood by and remained silent when the prosecutor asked for consecutive life sentences. It was incumbent on counsel to argue for concurrent sentencing as the more appropriate choice given appellant's role in the crime and the fact that the crime was a single event. Counsel should also have emphasized the fact that appellant had no criminal history and that he was involved with his family and had

prospects of rehabilitation. Had counsel acted appropriately, it is probable the trial court would have realized that consecutive sentences under the facts of his case constituted an abuse of discretion.

B. Relevant Authority

In order to establish ineffective assistance of counsel entitling a defendant to relief, the defendant must show that counsel's performance was deficient, falling below an objective standard of reasonableness, and the deficiencies were prejudicial.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 692; *In re Resendiz* (2001) 25 Cal.4th 230, 239.) Prejudice resulting from a deficient performance must be proved affirmatively. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.)

C. Counsel Not Ineffective

Because we have concluded that the trial court's discretionary sentencing choice was proper, appellant's contention that counsel was ineffective in failing to object to consecutive sentencing necessarily fails for lack of a showing of prejudice. In considering a claim of ineffective assistance of counsel, it is not necessary to determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different. (*People v. Williams* (1997) 16 Cal.4th 153, 215; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217–218; see *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) Appellant has failed to show this reasonable probability. On the record before us, we believe defense counsel's failure to argue against the imposition of consecutive sentences had no adverse effect on the trial court's decision. (See *People v. Waidla* (2000) 22 Cal.4th 690, 719.)

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ